No. 22453

IN THE

UNITED STATE COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH J. TYNAN,

Appellant,

vs.

FRANK A. EYMAN, Warden,
ARIZONA STATE PRISON,

Appellee.

APPELLEE'S ANSWERING BRIEF

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I N D E X

TABLE OF CASES AND AUTHORITIES

NOTE: For convenience, the following abbreviations are used throughout this brief.

The reporter's transcript of the June 30, 1967 hearing before the District Court is designated "R.T."

The transcript of record upon appeal is designated "Record"

The exhibits constituting part of the record on appeal are designated exactly as designated before the District Court.

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Appellant,	)
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	)
FRANK A. EYMAN, Warden, ARIZONA STATE PRISON,	)
	)
Appellee.	)
	)

JURISDICTION

Appellant is presently in the custody of the State of Arizona, serving a prison sentence imposed on April 30, 1956, by the Superior Court of the State of Arizona, in and for the County of Maricopa, following conviction by jury of the charges of rape and assault.

On August 4, 1964, appellant filed an application for a writ of habeas corpus in the United States District Court for the District of Arizona (Record at 1). The disposition of this application is not relevant to this appeal.

On April 15, 1965, the District Court permitted appellant to file in forma pauperis a reapplication for the writ (Record at 16). Presumably, jurisdiction of the District Court was invoked pursuant to 28 U.S.C.A. § 2254; the petition alleges violation of appellant's rights under United States Constitutional Amendments VI and XIV.

On the same date, April 15, 1965, the District Court denied the petition (Record at 23).

The District Court, on August 19, 1965, issued its Order and Certificate of Probable Cause for Appeal (Record at 26). Leave to appeal in forma pauperis was granted by the District Court on January 6, 1966 (Record at 28). This Court had jurisdiction over that appeal under 28 U.S.C.A. §§ 1291 and 2253. Notice of appeal was filed January 17, 1966 (Record at 29).

On January 13, 1967, this Court vacated the April 15, 1965, order of the District Court denying appellant's petition, and remanded the cause to the District Court for further proceedings consistent with the opinion (Record at 40; Tynan v. Eyman, 371 F.2d 764 (9th Cir. 1967).

Pursuant to this Court's order of January 13, 1967, the District Court held, on June 30, 1967, an evidentiary

hearing on the issues raised in the petition and in this Court's former opinion. On October 4, 1967, the District Court entered its formal order denying the petition for writ of habeas corpus (Record at 44).

The District Court, on October 16, 1967, issued its Certificate of Probable Cause and Order Permitting Appeal in Forma Pauperis (Record at 48). Petitioner's Notice of Appeal was filed October 16, 1967 (Record at 50). Appellant's opening brief was received by appellee on February 1, 1968. This Court has jurisdiction of the appeal by virtue of 28 U.S.C.A. §§ 1291 and 2253.

STATEMENT OF THE CASE

On April 30, 1956, appellant was sentenced by the Superior Court of the State of Arizona, in and for the County of Maricopa, to a term in the state prison following conviction by a jury of the charges of rape and assault.

Prior to the trial which resulted in this conviction, held April 18 and 19, 1956 (hereinafter sometimes referred to as the "third trial"; Defendant's Exhibit C), appellant had been tried twice on the same charges; each of the previous trials resulted in hung juries. The first trial

was held March 7, 1956 (Defendant's Exhibit B). The second trial was held March 28 and 29, 1956 (Defendant's Exhibit B). At each of the three trials appellant was represented by the same court-appointed counsel, Eugene Simon of Phoenix, Arizona (Defendant's Exhibits A, B, C). The transcripts of testimony of these trials were prepared from the reporters' notes just prior to the show cause hearing giving rise to this appeal. Before the three trials enumerated above, on January 10, 1956, appellant was given a preliminary hearing on the charges.

Prior to the petition which ultimately gave rise to this appeal, appellant had made numerous applications for writs of habeas corpus to various courts, both State and Federal. None of these proceedings are relevant here.

This appeal arises from a petition for habeas corpus filed April 15, 1965, alleging that appellant's constitutional rights had been violated because (1) he was denied counsel at his preliminary hearing, and (2) the prosecutor procured and used perjured testimony at the third trial. On the same day, April 15, 1965, the District Court denied the petition without hearing, stating that the preliminary hearing in Arizona is not a critical stage in the pro-

ceedings (Record at 23). Leave to appeal was granted January 6, 1966 (Record at 28).

This Court, in an opinion dated January 13, 1967 (371 F.2d 764; Record at 40), remanded the cause to the District Court for hearing on issues noted in the opinion. This Court, prior to rendering the opinion, received supplemental briefs from appellee State of Arizona on the issue of whether the preliminary hearing is a "critical stage" in Arizona.

This Court's prior opinion directed the District Court to hear evidence on whether a transcript of the victim's testimony at the preliminary hearing was available to appellant's counsel for impeachment purposes and hence whether lack of counsel at the preliminary hearing, under the circumstances, made the preliminary hearing a "critical stage" in the proceedings against appellant. In addition, the cause was remanded to determine whether perjured testimony procured by the prosecutor was used against the appellant.

On June 30, 1967, the District Court held an evidentiary hearing at which the evidence was directed to the issues raised by this Court in its prior opinion, as noted above. The District Court denied the writ and this appeal

was taken, testing whether the evidence presented to the District Court supports the order denying the petition. The preliminary hearing was reported and transcribed by a certified court reporter and filed in the clerk's office of the Maricopa County Superior Court on January 16, 1956 at 3:23 p.m., becoming part of the record in Cause No. 28279 (Defendant's Exhibit H; R.T. at 2-6). The appellant was not represented by counsel at the preliminary hearing (Defendant's Exhibits G and H; R.T. at 12). The only testimony taken at the preliminary hearing was that of the complaining witness, Fay Groot (Defendant's Exhibits G and H).

The preliminary hearing transcript discloses that the following question was asked of the victim concerning identification:

> "Q. Now, I am going to ask you if you have ever seen the defendant here, Mr. Joseph Tynan?
>
> "A. Yes." (Defendant's Exhibit H, at 3).

The transcript discloses that at no time during the preliminary hearing did Fay Groot or anyone else mention that Mrs. Groot's assailant or the appellant did--or did not--have a facial scar (Defendant's Exhibit H; R.T. at 34, 35 and 37).

With respect to the availability of the preliminary hearing transcript for use at the third trial, appellant's trial counsel testified that, though he has no recollection of his procedure in this particular matter, as a matter of practice he checked Superior Court records for preliminary hearing transcripts and read them if they were on file (R.T. at 21, 22, 31, 32). This must be considered in light of the fact that the preliminary hearing transcript in fact was filed in the Superior Court on January 16, 1956. Appellant's trial counsel further testified that he believed the court would have supplied him with a copy of the preliminary hearing transcript if he had requested it (R.T. at 32), but he may not have ordered a copy since the transcript would have been of no value in impeaching Mrs. Groot's identification (R.T. at 34, 35, 36). Also, trial counsel testified that he would have known the transcript was immediately available if he needed it (R.T. at 36).

After reviewing the preliminary hearing transcript, trial counsel testified that, in his professional opinion lack of counsel at the preliminary hearing did not prejudice appellant on the question of identification (R.T. at 35, 36, 42).

Appellant disputes the accuracy and completeness of the preliminary hearing transcript, particularly with respect to the identification testimony of Mrs. Groot (R.T. at 7, 8). However, appellant believes that a Doctor Salas and an investigating officer also testified at the preliminary hearing (R.T. at 9). Appellant's testimony relative to the accuracy of the preliminary hearing transcript is in conflict with the notes of the Justice of the Peace (Defendant's Exhibt H; R.T. at 93, 94), and the testimony of the prosecutor, who believed the transcript to be accurate (R.T. at 47). Appellant testified that his testimony is based purely on memory, and that he made no notes at any time after the preliminary hearing which was held over eleven years earlier (R.T. at 13, 14).

Testimony brought out at the show cause hearing with respect to the issue of subornation of perjury by the prosecutor established the following facts. Officer (now Sergeant) Preston Pettus, whose testimony appellant was relying on to prove this charge, had, at the time of the show cause hearing, no independent recollection of his exact testimony given at the third trial; however, he believes the transcript to be a substantially accurate record of his testimony (R.T. at 73, 74, 76). Sergeant

Pettus' testimony regarding the conversation between the prosecutor and Mrs. Groot prior to her testimony at the third trial appears in Defendant's Exhibt C at 113-116. The substance of Sergeant Pettus' testimony with respect to the conversation between the prosecutor and Mrs. Groot is as follows:

[By Mr. Simon]

"Q. What was the conversation at that time?

A. The conversation was between Mr. Cracchiolo and Mrs. Groot. It was merely going over some of the facts of what she remembered and what she would testify to.

Q. Was there any reference to a scar on the defendant's face?

A. She, Mrs. Groot, brought up the fact that there was something on Mr. Tynan's face which she described as looking similar to a scar, possibly being some type of a laughing line or some type of a line on his face.

Q. Was that in response to any question by Mr. Cracchiolo whether or not she was positive it was a scar?

A. I believe the original, original thought was hers, bringing up the -- that particular subject.

Q. Did she state whether or not previously she had said it was a scar?

A. She did not say."

(Defendant's Exhibit C, at 115-116)

Mr. Cracchiolo, the prosecutor, testified as to the substance of his conversation with Mrs. Groot prior to the third trial (R.T. at 51-54, 63-66). Mr. Cracchiolo specifically denied suggesting to Mrs. Groot that she should avoid describing the defendant as having a scar (R.T. at 53-54, 64). The prosecutor further testified that he did not feel Mrs. Groot had been definitive in the first two trials on whether the defendant had a scar. (R.T. at 65), that he did not attribute the importance that Mr. Simon did to the testimony about a scar (R.T. at 64-65), and that even taking Mrs. Groot's testimony on the scar in its worst light, the positiveness of her identification was not shaken:

[By Mr. Pierson]

"Q. Just a couple of questions. Mr. Cracchiolo, taking Mrs. Groot's testimony of the scar or no scar in its worst possible light for the prosecution, in your opinion did this affect the positiveness or would this affect the positiveness of her identification of Mr. Tynan?

A. Not one bit.

Q. Upon what do you base this?

A. I base it on an intimate knowledge of the witness. I saw her four times testify. I know I had to see her four times prior

> to testifying and I will never forget her as long as I live. She was absolutely terrified of this gentleman every time she saw him. She was absolutely terrified."
>
> (R.T. at 68-69).

Mr. Cracchiolo further testified that the discrepancies in Mrs. Groot's testimony were normal, especially in light of the time span involved (R.T. at 69-70).

Official records of the Phoenix Police Department show that appellant was identified on Department records as having a facial scar (R.T. at 80-84; Defendant's Exhibits I-1 through I-6).

SPECIFICATION OF ERRORS

Although appellant's brief contains no Specification of Errors, appellee believes appellant is raising the following points:

1. The District Court erred in finding that, on the facts of this case, the preliminary hearing was not a "critical stage" in the proceedings against appellant and that, therefore, lack of counsel at the preliminary hearing was not a denial of due process.

2. The District Court erred in finding that the transcript of the preliminary hearing was available to

the appellant's counsel at the third trial.

3. The District Court erred in finding, on the evidence before it, that there is no merit in the assertion that perjured testimony was procured by the prosecutor.

In addition, appellant raises several other points not considered by the District Court and not raised in the Petition for Writ of Habeas Corpus.

ARGUMENT

I

THE TRANSCRIPT OF THE PRELIMINARY HEARING HAD BEEN REDUCED TO WRITING AND WAS AVAILABLE TO APPELLANT'S COUNSEL AT THE THIRD TRIAL; UNDER THE CIRCUMSTANCES, LACK OF COUNSEL AT THE PRELIMINARY HEARING DID NOT MAKE IT A "CRITICAL STAGE" IN THE PROCEEDINGS AGAINST APPELLANT.

This Court's prior opinion in this matter (371 F.2d 764) makes it quite clear that in determining whether the preliminary hearing was a "critical stage" in the proceedings against the appellant, the primary question is whether a transcript of the victim's testimony at the preliminary hearing was available for use by defendant's counsel, for impeachment purposes, at the third trial.

The appellee submits that the evidence adduced at the June 30, 1967, hearing before the District Court

shows conclusively that, under the circumstances of this case, the preliminary hearing was not a critical stage in the proceedings against the appellant.

First of all, it has been conclusively established that the preliminary hearing proceedings were reported by a certified court reporter, that the reporter transcribed, or caused to be transcribed, his notes, and that the reporter's transcript of the preliminary hearing proceedings were filed in the Superior Court Clerk's office on January 16, 1956, and thus would have been available at any time after that for use by the appellant's counsel. The appellant's opening brief discloses that his copy of the preliminary hearing transcript was made from a copy in possession of the appellee, and therefore does not bear the stamp of the Clerk of Superior Court indicating that the transcript in fact was filed on January 16, 1956; appellant's arguments on whether the transcript was filed are therefore based on an erroneous premise.

The testimony of Mr. Eugene Simon, appellant's trial counsel, together with the hearing transcript itself, makes it quite clear, contrary to appellant's

recollection, that Mrs. Groot gave no testimony at the preliminary hearing concerning a scar. Furthermore, the hearing transcript would have been, in Mr. Simon's professional opinion, of no help for impeachment at the third trial. Mr. Simon further concluded that appellant was not prejudiced by lack of counsel at the preliminary hearing, at least as to the identification issue. It seems clear from Mr. Simon's testimony that he undoubtedly had perused the preliminary hearing transcript but had found it of no value, and therefore had not requested a copy of it.

Appellee submits that the record itself with respect to the preliminary hearing transcript, and the observations of appellant's trial counsel, Mr. Simon, makes it quite evident that the transcript of the preliminary hearing was available for impeachment purposes, but that it was of no value for impeachment, and that lack of counsel at the preliminary hearing was not prejudicial to the appellant.

Appellant disputed the completeness and accuracy of the transcript of the preliminary hearing, and even disputed the accuracy of the notes of the Justice of the

Peace, which tended to verify the correctness of the transcript itself. Appellant's petition, his testimony at the show cause hearing, and his opening brief do in fact indicate that his recollections of what transpired at the preliminary hearing differ greatly from the records and the recollections of others. Appellee believes that the fact that the appellant steadfastly maintained that more witnesses than Mrs. Groot actually testified at the preliminary hearing (despite the reporter's transcript, the Justice of the Peace's notes, and Mr. Cracchiolo's testimony to the contrary), thoroughly discredits his recollection of what transpired over eleven years earlier at that hearing. And if the appellant is confused about how many people testified at the hearing, it is more than likely that he is also mistaken as to the substance of Mrs. Groot's testimony. With eleven years of confinement in which to brood over the "injustice" done to him, it is not unlikely that truth became mixed with wishful thinking--especially since appellant admittedly had no notes or record of what transpired at the preliminary hearing. Weighing against appellant's vague recollections, possibly confused with wishful thinking, is the

reporter's transcript, which was certified by a certified court reporter, and which became an official record of the Superior Court. The Supreme Court of Arizona, in State v. Hill, 88 Ariz. 33, 39, 352 P.2d 699, 703 (1960), noted the strong presumption as to accuracy to be given to transcripts of official court reporters:

> "Official court reporters are appointed by the judges of the Superior Courts, A.R.S. § 12-221, and as such they are judicial employees. By reason of their official position, a strong implication attaches to their transcripts of testimony that they are accurate and truthful."

In addition to this presumption, the District Court had an opportunity to observe Mr. Tynan's demeanor as he testified on this and other points, and presumably took into consideration his denial of the accuracy of the Justice of the Peace's own records which corroborate the transcript. And in addition, the prosecutor, Mr. Cracchiolo, also corroborated the transcript. Findings of Fact by a District Judge on habeas corpus petition will not be set aside unless clearly erroneous, and due consideration will be given to the District Court's determination of the credibility of the witnesses. Gray v. Henderson, 354 F.2d 986 (6th Cir. 1965), cert.

denied, 383 U.S. 961 (1966); U.S. ex rel. Bloeth v. Denno, 313 F.2d 964 (2d Cir. 1963), cert. denied, 372 U.S. 978 (1963).

For the reasons stated, the appellee believes the issues raised by this Court in its prior opinion have been answered by the evidence below in such a manner as to compel a finding that in this case the preliminary hearing was not a "critical stage" in the proceedings against the appellant.

ARGUMENT

II

THE RECORD SUPPORTS THE FINDING THAT THE PROSECUTOR DID NOT PROCURE AND OFFER PERJURED TESTIMONY AGAINST THE APPELLANT.

The evidence below shows that appellant has failed completely to substantiate his charge that perjured testimony procured by the prosecutor was used in the third trial, resulting in conviction.

Sergeant Preston Pettus' testimony at the third trial regarding the conversation he overheard between the prosecutor and Mrs. Groot (a portion of which is set out in the Statement of the Case, supra) is no proof what-

ever of the charge. Indeed, Pettus testified that it was Mrs. Groot, not Mr. Cracchiolo who brought up the issue of whether there was a scar or not. Additionally, Mr. Cracchiolo, the prosecutor, flatly denied the charges, and the District Court had an opportunity to observe his demeanor, as well as that of appellant. In sum, there is no testimony to contradict the prosecutor's denial that perjury was suborned. An examination of the record leads one to the conclusion that the prosecutor himself came to: the variations in the victim's testimony were not abnormal and Mrs. Groot's testimony in the first two trials had not been definitive as to whether the defendant had a scar or not. It is clear from Mr. Cracchiolo's testimony, that the prosecution did not consider the scar testimony as important as did the defense. Finally, Mr. Cracchiolo testified flatly that however Mrs. Groot's testimony about the scar is viewed, her identification of the appellant as her assailant was positive. The appellee submits the evidence fully supports the District Judge's finding that there was no merit in the assertion by the petitioner that perjured testimony was produced by the prosecutor.

Additionally, the records of the Phoenix Police Department show that officers trained in making identification themselves, as part of their official records, listed Mr. Tynan as having a scar on his right cheek. Certainly, these records at least create a reasonable basis for assuming that whether appellant had a scar or not was a matter of opinion. In this light, Mrs. Groot might well be forgiven her apparent uncertainty as to the scar. Clearly, she at no time harbored any doubt that appellant was her assailant.

In addition to the foregoing, Mr. Simon's testimony makes it quite apparent that any discrepancy between Mrs. Groot's testimony at the first and second, as opposed to the third, trial was fully brought out by counsel for the benefit of the jury and the trial judge.

ARGUMENT

III

ISSUES RAISED FOR THE FIRST TIME ON APPEAL WILL NOT BE CONSIDERED BY THE APPELLATE COURT.

In addition to the points previously covered, appellant, for the first time in his opening brief, raised issues of the sufficiency of the lineup identification

by the plaintiff; the correctness of the arrest record; the fact that he was questioned by Phoenix Police detectives enroute from Los Angeles to Phoenix without having been advised of his right to remain silent; that he was not taken before a Justice of the Peace until December 31, 1955, despite the fact that he arrived in Phoenix in custody on December 28, 1955; that the prosecutor led the witness at the preliminary hearing; that the Justice of the Peace did not inform him of his right to make a statement not under oath at the preliminary hearing; and that the prosecutor improperly used his power of suggestion on the Justice of the Peace in requesting that the bond be increased. Although each of these issues is vulnerable to one or more arguments on its merits, appellee believes the rule is clear that on an appeal from a lower court denial of a petition for habeas corpus, the Court of Appeals will not consider those grounds for relief which appellant asserted for the first time in his notice of appeal and in his briefs filed in the Court of Appeals. Flemings v. Wilson, 365 F.2d 267 (9th Cir. 1966). Certainly none of the issues enumerated, even if proved, manifest a miscarriage of justice which might modify

the foregoing rule. See Chester v. People of California, 355 F.2d 778 (9th Cir. 1966); Thomason v. Klinger, 349 F.2d 940 (9th Cir. 1965).

CONCLUSION

There is ample evidence to support the findings of the District Court on the issues remanded to it. The decision of the District Court should be affirmed.

Respectfully submitted,

DARRELL F. SMITH
The Attorney General

CHARLES S. PIERSON

CHARLES S. PIERSON
Assistant Attorney General

Attorneys for Appellee

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

CHARLES S. PIERSON, being first duly sworn upon oath, deposes and says:

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CHARLES S. PIERSON
CHARLES S. PIERSON

Subscribed and sworn to before me this 1st day of March ~~February~~, 1968.

/s/ Connie Rae Laughlin
Notary Public

My Commission Expires:

April 21, 1969

Copy mailed this 1st day of March ~~February~~, 1968, to:

Joseph J. Tynan, #18933
Arizona State Prison
Florence, Arizona

By CHARLES S. PIERSON
CHARLES S. PIERSON